IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 385 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

NANJIBHAI FULABHAI MACHHI - Opponent(s)

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Appearance :
MR KP RAVAL APP for Appellant(s) : 1,
MS RV ACHARYA for respondent (s) : 1,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 16/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Respondent ('the accused' for short) was charged and

tried by learned Sessions Judge, Kheda at Nadiad in Sessions Case No.100 of 1985 for commission of the offence under Section 302 of the Indian Penal Code ('IPC' for short) arraigned on charge of having committed murder of Bhikhabhai Hirabhai Machhi by inflicting blows with an empty bottle with an intention to cause his death. At the end of the trial, the accused was found not guilty of the offence with which he was charged and resultantly he was acquitted of the said offence vide judgment and order dated 9.12.1985, giving rise to this appeal filed under Section 378 of the Code of Criminal Procedure ('the Code' for short) at the instance of the appellant – State of Gujarat.

2. Prosecution version, as reflected from FIR and unfolded during trial, was that, on the day of the alleged incident, i.e., 15.4.1985, Jiviben Ranchhodbhai, who reported the incident at the police station was preparing for cooking roti, in her house, at about 11 P.M. At that time, Bhikho, the son of her brother Hirabhai Ratnabhai, residing at Machhipura came to her house and asked her whether anything was cooked to which she replied that she was preparing for cooking. He asked her to give him water. As there was a roti in her hand, she told him to take water by himself. He drank water and

went out of her house. At that time, her son-in-law Nanji Fula came there with an empty bottle in his hand. He asked her nephew Bhikhabhai why he was giving abuses. Bhikhabhai told him to go to his house. So Nanji became angry and gave two blows with the empty bottle in his hand on the back of Bhikhabhai and gave third blow on his neck. The complainant intervened to save Bhikhabhai. She shouted and on hearing shouts, Punjiben Soma and one Patlani whose husband is a Muslim whose name is not familiar to her, residing in the neighbourhood, and her niece Saviben Shankar and her nephew Manubhai Bhikhabhai, etc., intervened. They asked Nanji not to beat. Then Nanji went away. Thereafter Punjiben and the complainant, etc., took Bhikhabhai in her house. At that time he became unconscious. So Patlani and the complainant went to the house of Bhikhabhai and informed his wife Dhani and Bhikhabhai's brother Mafat. They came to the house of the complainant and saw that Bhikhabhai was dead. Therefore, Mafat and the complainant went to Khambhat City Police station and lodged the complaint. The reason given by the complainant for killing Bhikhabhai was that Bhikhabhai and his wife came from Kavi for last one month and they were staying with her for 15 days which Nanjibhai disliked and he was envious. The complainant drove Bhikhabhai away from her house and according to the

complainant, Nanji killed Bhikhabhai because of his displeasure.

3. The complaint was registered at Khambhat Police Station against the accused for the offence punishable under section 302 of the IPC. Thereafter investigation was carried out. During the course of investigation, statements of witnesses were recorded, panchnama, including inquest panchnama of the dead body of deceased Bhikhabhai, were prepared and the dead body was shifted to the hospital for autopsy and after receipt of the autopsy report since evidence was divulged against the accused for commission of the offence under section 302 of the IPC, the accused was charge-sheeted in the court of the learned Chief Judicial Magistrate, Khambhat. Since the offence against the accused was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Khambhat committed the case to the Court of Sessions where it was registered as Sessions Case No.100 of 1985.

4. On committal, the learned Sessions Judge framed charge against the accused for commission of the offence under section 302 of the IPC. The charge was read over and explained to the accused who pleaded not guilty to

the charge and claimed to be tried. Therefore he was put on trial.

5. To prove the culpability of the accused, the prosecution has examined the following witnesses:

(i) P.W.1, Jiviben Ranchhodbhai (complainant) Ex.14.

(ii) P.W.2, Jashuben Bansibhai (witness) Ex.16.

(iii)P.W.3, Punjaben Somabhai (witness) Ex.17.

(iv) P.W.4, Dr.Devendrakumar I. Chudasama (the medical officer who performed autopsy on the dead body ofdeceased Bhikhabhai) Ex.18.

(v) P.W.5, Subhashbhai Lallubhai (witness) Ex.22.

(vi) P.W.6, Yavarhusen Ahmedhusen (witness) Ex.23.

(vii)P.W.7, Mohmadhanif Gulamrasul (witness) Ex.24.

(viii)P.W.8, Manubhai Bhikhabhai (witness) Ex.25.

(ix) P.W.9, Chandrasinh Navalsinh Zala (I.O.) Ex.26.

The prosecution has also relied upon the documents like complaint, panchnama, autopsy report, etc.

6. After recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement. In his further statement under

Section 313 of the Code, the accused denied the case of the prosecution in toto. Howevre, he neither led any evidence nor examined any witness to support his defence.

7. On appreciation, evaluation and analysis of the evidence on record, the learned Sessions Judge came to the conclusion that the so-called eye witnesses were not genuine and real eye witnesses and they tired to wrongly identify themselves as eye witnesses and therefore the prosecution has failed to establish that deceased Bhikhabhai has died because of the blows inflicted by the accused upon him. The prosecution therefore failed to establish the charge levelled against the accused beyond reasonable doubt and therefore recorded the finding of not guilty and resultantly he acquitted the accused of the alleged offence with which he was charged, giving rise to this appeal.

8. Mr. K.P. Raval, learned APP has contended that the impugned judgment and order of acquittal passed by the learned Sessions Judge is contrary to law and the evidence on record as the learned Sessions Judge has materially erred in not believing number of eye witnesses. It is also asserted by him that the learned Sessions Judge has materially erred in not appreciating

the fact that the deceased had received three injuries inflicted by the accused. It is also emphasised by him that the reason given by the learned Sessions Judge for acquitting the accused of the charge of murder is neither legal nor proper and hence it is required to be reappreciated by this Court. According to the learned APP, there is no contradiction in the evidence of all the eye witnesses. It is true that the complainant has turned hostile. However, the learned Sessions Judge has compared the evidence of eye witnesses with the evidence of the complainant which has resulted into miscarriage of justice. Therefore, according to him, there is sufficient evidence on record to connect the accused with the crime and convict him for the offence of murder. He therefore urged to allow this appeal by quashing and setting aside the order of acquittal by convicting the accused for the commission of offence of murder and to punish him in accordance with law.

9. As against this, Ms. RV Acharya, learned advocate appointed by the legal aid for the accused and to assist the Court, has supported the judgment and order of acquittal recorded by the learned Sessions Judge and according to her no illegality or infirmity has been committed by the learned Sessions Judge in acquitting the

accused since the evidence of the so-called eye witnesses is not reliable and trustworthy and their evidence is bristled with a lot of contradictions. According to her, when Jiviben who is the complainant, herself has not supported the prosecution version, the learned Sessions Judge has rightly disbelieved the evidence of the so-called eye witnesses. She therefore asserted that no interference is called for in this acquittal appeal wherein the scope of this Court to interfere is very limited in view of catena of decisions of the Supreme Court. She, therefore, urged to dismiss the appeal.

10. We have considered the submissions advanced by Mr. KP Raval, learned APP for the appellant – State of Gujarat and Ms. RV Acharya, learned advocate appointed by legal aid on behalf of the accused to assist this Court. We have also perused the impugned judgment and order passed by the learned Sessions Judge acquitting the accused and the set of evidence, R & P called for from the sessions Court and the judgments cited at the Bar.

11. On reappreciation, reevaluation and reanalysis of the evidence on record, there is no dispute about homicidal death of Bhikhabhai. In this connection, the prosecution has examined P.W.4, Dr. Devendrakumar at

Ex.18 who has performed autopsy on the dead body has inter alia testified about the cause of death of deceased Bhikhabhai. According to him, the deceased died due to intra cranial (extra-dural and sub-dural) hemorrhage following head injury. He has prepared the autopsy report and the same is exhibited at Ex.19. Therefore, homicidal death of deceased Bhikhabhai is proved by the prosecution.

12. Now the question which falls for our consideration is as to who is the author of the said injuries? According to the prosecution version, the accused is the author of the said injuries. To prove the said fact the prosecution has examined P.W.1, Jiviben Ex.14. Deceased Bhikhabhai was her nephew whereas the accused is her son-in-law. She has not supported the prosecution version and therefore she was declared hostile and the learned PP was permitted to cross-examine her and therefore she was cross-examined by the learned P.P. The prosecution thereafter relied upon the evidence of P.W.2, Jashuben, Ex.17, P.W.6, Yavarhusen at Ex.23, P.W.7, Mohmedhanif at Ex.24 and P.W.8 Manubhai at Ex.25 as according to the prosecution they were eye witnesses. On close scrutiny of there evidence, it is seen that they were residing at some distance and they came and assembled there after the

alleged incident had taken place. Some of them have stated that they saw the incident from their house. In fact, at the place of incident there was no light at all and how they could see the incident is not explained by the prosecution and therefore, according to us, the learned sessions Judge has rightly disbelieved their evidence. They are not the witnesses of sterling qualities as their evidence is bristled with a lot of contradictions. They wrongly identified themselves as eye witnesses.

13. In view of the unsatisfactory evidence led by the prosecution, we are of the considered opinion that no illegality is committed by the learned Sessions Judge in acquitting the accused of the offences under Section 302 of IPC. We are in complete agreement with the findings, ultimate conclusion and resultant order of acquittal recorded by the learned Sessions Judge, as in our view, no other conclusion is possible except the one reached by the learned Sessions Judge.

14. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing

the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned Sessions Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

15. In the case of RAM KUMAR V. STATE OF HARYANA, reported in AIR 1995 SC 280, Supreme Court has held as under:

> "The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of

> the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

16. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned Sessions Judge. As this Court is in general agreement with the view expressed by the learned Sessions Judge, it is not necessary for this Court either to reiterate the evidence of the prosecution witnesses or to restate reasons given by the learned Sessions Judge for acquittal and in our view, expression of general agreement with the view taken by

the learned Sessions Judge would be sufficient in the facts of the present case for not interfering with the judgment of the learned Sessions Judge and this is so, in view of the decisions rendered by the Hon'ble Supreme Court in the case of GIRJA NANDINI DEVI AND OTHERS V. BIJENDRA NARAIN CHAUDHARI, AIR 1967 SC 1124 and STATE OF KARNATAKA V. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417.

17. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Sessions Judge for acquitting the accused. Suffice it to say that the learned Sessions Judge has given cogent and convincing reasons for acquitting the accused and the learned A.P.P. has failed to dislodge the reasons given by the learned Sessions Judge and convince this Court to take a view contrary to the one taken by the learned Sessions Judge.

18. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order acquitting the accused of the offence with which he was charged.

19. For the foregoing reasons, the appeal fails and accordingly it is dismissed.

Bailable warrant issued against the accused is discharged. Since the accused is on bail, his bail bonds shall stand cancelled and surety is discharged.

(A.M. Kapadia, J.)

(S.R. Brahmbhatt, J.)

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